

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

ALICE H. ALLEN, et al.

V

DAIRY FARMERS OF AMERICA,
INC., et al.

*
*
*
*
*
*

CIVIL FILE NO. 09-230

STATUS CONFERENCE

Tuesday, September 29, 2015
Burlington, Vermont

BEFORE:

THE HONORABLE CHRISTINA R. REISS
Chief District Judge

APPEARANCES:

BRENT W. JOHNSON, ESQ., and KIT A. PIERSON, ESQ.,
Cohen Milstein Sellers & Toll PLLC, 1100 New
York Avenue, N.W., Washington, D.C.; Attorneys
for the Plaintiffs

ROBERT G. ABRAMS, ESQ. and DANYLL W. FOIX, ESQ.,
BakerHostetler LLP, Washington Square, Suite
1100, 1050 Connecticut Avenue, NW, Washington,
D.C.; Attorneys for the Plaintiffs

Appearances Cont'd...

ANNE NICHOLS PIERCE
Registered Professional Reporter
United States District Court
Post Office Box 5633
Burlington, Vermont 05402
(802) 860-2227

APPEARANCES CONTINUED:

ANDREW D. MANITSKY, ESQ., Lynn, Lynn, Blackman &
Manitsky, P.C., 76 St. Paul Street, Suite 400,
Burlington, Vermont; Attorney for the Plaintiffs

STEVEN R. KUNEY, ESQ. Williams & Connolly LLP,
725 Twelfth Street, N.W., Washington, D.C.;
Attorney for Defendant Dairy Farmers of America,
Inc.

CRAIG S. NOLAN, ESQ., Sheehey, Furlong & Behm,
P.C., 30 Main Street, Burlington, Vermont;
Attorney for the Defendant

DANIEL J. SMITH, ESQ., Northeast Dairy Compact
Commission Executive Director, 16 State Street,
Montpelier, Vermont; Attorney for the
Intervenors

RICHARD T. CASSIDY, ESQ., Hoff Curtis, 100 Main
Street, Burlington, Vermont; Attorney for the
Intervenors

*** ** ***

ANNE NICHOLS PIERCE
Registered Professional Reporter
United States District Court
Post Office Box 5633
Burlington, Vermont 05402
(802) 860-2227

1 TUESDAY, SEPTEMBER 29, 2015

2 (The following was held in open court at 10:02 a.m.)

3 COURTROOM DEPUTY: Your Honor, the matter
4 before the Court is civil case number 09-230, Alice
5 Allen, et al., versus Dairy Farmers of America, et al.
6 Representing the plaintiffs are attorneys Kit Pierson,
7 Brent Johnson, Robert Abrams, Danyll Foix and Andrew
8 Manitsky. Representing the defendants are attorneys
9 Steven Kuney and Craig Nolan.

10 And we are here for a status conference.

11 THE COURT: Good morning.

12 MR. PIERSON: Good morning, your Honor.

13 MR. ABRAMS: Good morning, your Honor.

14 MR. KUNEY: Good morning.

15 THE COURT: We don't usually have this well
16 attended a status conference, but I am glad everybody is
17 here.

18 My goal is to set a course for going forward. It
19 has been -- I am going to have a candid conversation
20 with you. It's been my observation that there has been
21 chaos north of the V and that neither class counsel nor
22 subclass representatives are necessarily making
23 decisions that are benefiting the class. So if there's
24 no evidentiary support for a removal of counsel, hearing
25 a day's testimony about attorney/client information and

1 strategies accepted and rejected isn't in the best
2 interests of the class. Likewise, repeated efforts to
3 get rid of counsel or to suggest they're incompetent is
4 not in the best interests of the class. Representations
5 that everybody who has filed a proof of claim isn't
6 supportive of the settlement is not in the best
7 interests of the class. It's also not true. So we are
8 going to set a path forward.

9 My thought was adding additional voices to the
10 class representatives, without necessarily getting rid
11 of the class representatives we have, would be an
12 appropriate way to interject some order in what's
13 happening. And now I understand that there's no
14 objection to additional class representatives -- class
15 counsel, I should say, and so they have been added, and
16 my thought is, if you ask, I will give you some time to
17 see if you can make, as the new class representatives
18 suggested, a final go at settlement.

19 Otherwise, we are going to set it for trial. We
20 are going to go forward, and we are going to resolve the
21 case. And it's also my observation that it has not been
22 helpful for plaintiffs' counsel to vet ideas with
23 defendants' counsel and then explain to class
24 representatives why the defendants reject them. That's
25 just not -- it's kind of the whole process has gotten

1 muddled.

2 This is a -- not -- it doesn't need to be
3 adversarial in tone, and the attorneys are working well
4 together, but I have never had a case where settlement
5 is based on the defendants persuading the class
6 representatives that what they're suggesting is not
7 appropriate and it's going through plaintiffs' counsel
8 at the time. I understand you need to transmit that,
9 but that's not been particularly helpful.

10 On the same token, I agree that some of the class
11 representatives' requests for relief are just
12 unrealistic, and if they are set in stone and that's the
13 only thing you will accept and anything short of that
14 isn't going to work, you are not really understanding
15 the settlement process, which is often a compromise and
16 getting the best deal possible for the whole class as
17 opposed to the perfect deal that will satisfy each class
18 representative in its entirety.

19 So we are going to try to get things on track. I
20 am happy to hear your -- your opinions in that regard.
21 I have pending -- the only motions pending now are the
22 renewed motion to appoint new counsel; the motion to
23 decertify the DFA, DMS subclass due to lack of adequate
24 representation; the motion to appoint Peter Southway,
25 Marilyn Southway, Reynard Hunt and Robert Fulper as DFA,

1 DMS subclass representatives; and there's a motion to
2 substitute them for current DFA, DMS subclass
3 representatives that was filed by Claudia Haar, Jonathan
4 Haar and Richard Swantak.

5 So I am going to start with plaintiffs, and then we
6 will work over to defendants.

7 MR. PIERSON: Your Honor, this is Kit Pierson.
8 I guess there are a couple of things I would like to say
9 preliminarily and then happy to address these motions in
10 whatever sequence you want to.

11 I mean, in terms of where the case is and where
12 it's going, which is the most important question, I
13 think the Court is -- the Court is right. The Court has
14 sort of set a process in motion with these new subclass
15 reps. We think new subclass reps should be added on the
16 non- -- on the DFA, DMS side as well. And the whole
17 rationale for them coming in was to let them evaluate
18 the settlement, participate in the settlement
19 discussions, and see where that goes. And it seems to
20 me that's the right course to let -- and you can talk to
21 them about how long that process needs to run, but I
22 think that process should run its course, should be
23 presented to the Court, and if -- if that doesn't result
24 in a conclusion of the litigation, then we should be
25 going to trial.

1 THE COURT: So you aren't asking that any of
2 the current subclass representatives be removed?

3 MR. PIERSON: We are, your Honor. We are
4 asking to be removed.

5 THE COURT: Okay.

6 MR. PIERSON: Your Honor, I do want to comment
7 on two of the comments the Court made about -- with
8 regard to the views about the settlement, which I think
9 are -- I think they're not fair, frankly, and let me
10 just give you my view on them.

11 You made the comment about the -- our point that
12 7500 class members have submitted claims.

13 THE COURT: Not submitted claims. Signed on
14 to the settlement is what I have seen.

15 MR. PIERSON: They submitted claims,
16 your Honor.

17 THE COURT: I know.

18 MR. PIERSON: Yeah.

19 THE COURT: And it's been framed as signed
20 on to the settlement.

21 MR. PIERSON: Let me finish in --

22 THE COURT: Okay.

23 MR. PIERSON: -- how I would frame that.

24 Those class members were given -- were essentially
25 told they could do things, and they weren't mutually

1 exclusive. They were told that they could submit
2 claims, and they were told that they could submit
3 objections and were told how to submit objections.

4 Now, those 7500 farmers made what I think would be
5 fairly described as a decision, because that choice was
6 clearly presented to them, and the decision they made
7 was to submit a claim, and the decision they made was
8 not to submit any objections to the settlement even
9 after having been told to do so.

10 Now, I think -- I think reasonable people can argue
11 about how much weight that is entitled to.

12 THE COURT: Well, what about your notice to
13 the class? I approved it, so I know what it says, and
14 it said just because you submit a proof claim does not
15 mean that you are agreeing with the settlement.

16 So you are right, they did not file objections.
17 You have equated filing a proof of claim with signing on
18 to the settlement, or that's how it's been represented.
19 I have a problem with that because I don't think those
20 are the same things. You can have a different view.

21 MR. PIERSON: They are not identical,
22 your Honor, but what we have said is these folks were
23 told not just you can submit a claim, but they were also
24 told, if you have objections, you can submit objections,
25 and here's how to. And they all chose not to do that,

1 and what -- my main point is that's entitled to some
2 weight. How much weight the Court gives it or how one
3 wants to characterize it, one could reasonably disagree
4 with, but that's a choice they made. That's kind of
5 point one.

6 Point two, you made the comment about the
7 discussions with DFA, and I think that -- that may have
8 kind of been a misunderstanding of what happened here.
9 You know, what happened was we were presented by the
10 class repre- -- subclass representatives with -- with
11 terms that they wanted as part of a negotiated
12 settlement. They were described by them as
13 nonnegotiables.

14 We presented them to the defendants, which is
15 exactly what we were really probably required to do, but
16 in any event, we did it. The defendants then told us
17 why they would not agree to those -- they would not
18 agree to those terms, they were nonstarters, and the
19 reasons for that.

20 We communicated to the class representatives what
21 DFA had told us in the course of the settlement. We had
22 communicated to the class representatives. And I am
23 saying all this because it's in documents that they have
24 submitted. We told them what DFA said. We told them
25 the rationale for what DFA said. That was -- I would do

1 that in any case where I am discussing with the
2 defendants. That's the appropriate thing to do.

3 Now, that doesn't mean that we have to agree with
4 DFA, DMS. We have to make an independent judgment about
5 whether that's realistic -- whether those are realistic
6 things to seek or not, but the point that had to be
7 communicated to the class reps was, you can decide
8 whether you want to pur- -- we can all decide whether
9 you want to proceed to trial on that basis but there
10 will be no settlement on this basis because this is
11 DFA's decision, this is why they feel strongly about it,
12 and it's nonnegotiable from their point of view.

13 So, your Honor, there was just absolutely nothing
14 wrong with communicating. There really wasn't. So
15 that's really -- that's really --

16 THE COURT: Okay.

17 MR. PIERSON: I don't want to quarrel with
18 you, but I --

19 THE COURT: I agree with you on point two, not
20 on point one. So you have got a partial victory.

21 MR. PIERSON: I'll take that, your Honor.

22 I guess the one issue probably that I should --
23 that I should address is the -- is the motion for --
24 about -- regarding the class representatives, and
25 there're really two pieces of that.

1 One is that we have proffered four additional
2 subclass representatives: Peter Southway,
3 Mrs. Southway, Reynard Hunt, and Robert Fulper. We've
4 reviewed their qualifications. They have all committed
5 to -- they understand their responsibilities. They have
6 committed to consider the interest -- they understand
7 they have an obligation to consider the interests of the
8 entire subclass. They're all highly qualified, and I
9 think the rationale the Court gave for adding subclass
10 representatives on the other side of the subclass, which
11 we, frankly, didn't take a position on -- we sort of
12 thought it was not our fight, but the rationale adopted
13 by the our -- by the Court really supports the same
14 conclusion on our side of the class. So I --

15 THE COURT: So let me ask you about that,
16 because I -- you know, and being stumped as to how we
17 are going to get this case to a resolution short of
18 forcing you to go to a trial, which is a possibility,
19 when it's obvious that both sides do think a settlement
20 is feasible, I don't understand why we would have to
21 replace the existing class representatives.

22 So one thing I am concerned about, I think that
23 they need to get with the program and represent the
24 whole class and be less obstructive, and I tried to make
25 that clear, that this is -- is not in the best interests

1 of the class. You have to represent everybody.

2 But why replace the dissenting voices? So it's one
3 thing to say new views from the class on both sides of
4 the subclasses, but why do our existing class
5 representatives have to go?

6 MR. PIERSON: Well, it's a good question and I
7 agree they're distinct questions. And, your Honor, as
8 you can imagine, having been accused of a variety of
9 things, you know, it's an issue I have wrestled with,
10 frankly, for years about how to deal with the subclass
11 rep situation, and one of the aspects of it that is
12 troubling to me -- it does go to your question -- is,
13 you know, if it was just me they were having problems
14 with, I'd get someone else to replace me. I really
15 would.

16 The problem here is, you know, there're eight
17 attorneys from four different law firms. You know,
18 Mr. Abrams has been described as a snake and a liar.
19 You know --

20 THE COURT: Well, they don't have any problem
21 with the local counsel, and --

22 MR. PIERSON: Well, your Honor --

23 THE COURT: -- they have new attorneys.

24 MR. PIERSON: -- that actually is not correct,
25 your Honor, because I have told them -- I have made very

1 clear to them that they can interact with Mr. Manitsky
2 whenever they want to, and Mr. Manitsky can tell you his
3 own experience, but what I would tell you, your Honor,
4 and it's quite truthful, is that if they get advice that
5 they don't like or disagrees with some preformed view of
6 what the law is or what they think the record ought to
7 be or whatever, they are not going to -- they are not
8 going to accept the words from any messenger. They will
9 either just -- frankly, it includes the Court. They
10 may -- they'll either dismiss it as irrelevant or they
11 will -- or they'll demonize the attorneys, and that's
12 what's happening.

13 Mr. Manitsky can talk about his own experience, but
14 what I will tell your Honor is -- is I have at multiple
15 points over the last six years encouraged them to reach
16 out to other counsel, whether it's Dave Balto, whether
17 it's Mr. Manitsky. I have no problem with them talking
18 to the -- to Mr. Abrams and his team if that would help.
19 Made multiple attorneys -- and, your Honor, I have hit a
20 point in life where, frankly, you know, I look for
21 patterns, because there're always one-offs, and it's
22 hard to read into one-off, but what I can represent to
23 you as an officer of the court is it really hasn't
24 mattered, you know, which attorney is involved. And so
25 that's a fundamental concern.

1 And the -- what finally led to our motion,
2 your Honor, which, for some, it may have been a
3 long time in the coming, was just an accumulation of
4 things and a conclusion that -- you know, I will tell
5 your Honor, I take -- you know, you heard me testify
6 about it at length. I take a lot of pride in the
7 practice of law, and I take a lot of pride in my
8 integrity as a lawyer. This is a new -- new problem for
9 me, and my own feeling is that it's become an enormous
10 distraction, an enormous waste of resources, and that --
11 and that we have got subclass representatives who
12 basically -- they have their own view of the world,
13 which they are entitled to, you know -- it's one of the
14 things I have always admired about them, that they have
15 their own view of the world, but the problem is,
16 your Honor, is that they either won't seek legal advice
17 or, if they get legal advice or even instructions from
18 the Court, which were quite clear about recording -- I
19 mean, could not have been clearer about recording
20 conversations, if they -- if they're getting something
21 they don't like, it's rejected, and that hurts the
22 class. It hurts the class a lot.

23 So what it's meant over the course of this
24 litigation, it's meant that letters have been sent to
25 the court without running them by counsel or even -- not

1 only not running with -- them by counsel, without
2 counsel even knowing they were being sent to the
3 court --

4 THE COURT: So -- but if we want to go -- and
5 I really don't think it's helpful to go down this
6 particular path for the class as a whole. So I remember
7 when we had the motion for new counsel and Mr. Abrams
8 started telling me, As soon as this motion's done, we
9 are going to get rid of these class representatives, and
10 me saying to him, How is that helpful? And then I get a
11 motion for approval of the settlement. You don't need a
12 fairness hearing. You don't need notice. Just approve
13 it. And how is that helpful?

14 So I understand that you need class representatives
15 that you can work with. And I understand the presence
16 of dissenting class representatives may be problematic,
17 but it's a whole lot less problematic if there is a
18 group that you can work with, and if the dissenting
19 class representatives don't want to work with counsel,
20 at some point they will voice their objections to any
21 settlement. We will take it into consideration. When
22 we get to trial, you got a bigger problem because you
23 cannot have active --

24 MR. PIERSON: Right.

25 THE COURT: You can't have somebody tanking

1 the case from the witness stand. But I don't see the
2 need to eradicate dissenting voices.

3 I agree that you are accused of many things that
4 were not proved up, and that we're kind of right back at
5 that "I expect you to rise above it," you know --

6 MR. PIERSON: Yeah.

7 THE COURT: -- that there was no evidence
8 presented, true evidence, and I made it very clear
9 you gotta testify from the witness stand. You can't
10 just make arguments. I could have decided that motion
11 on the first day. And it was class counsels' decision
12 to testify in their honor. Fine. So I want -- I want
13 that stuff, if possible, to stop because it's not in the
14 best interests of the class.

15 MR. PIERSON: I think that's fair, your Honor,
16 but let me -- I mean, this is a very candid conversation
17 we're having --

18 THE COURT: We are.

19 MR. PIERSON: -- and I want to be very candid
20 with you. One of my frustrations with the judiciary is
21 often the easy course for judges when they see people
22 going at it -- usually it's attorneys, thankfully, but
23 is to sort of say a pox on both your houses. It's sort
24 of like -- sort of like blaming Congress: It's -- it's
25 everyone's fault. And here's what I -- what I would

1 like to tell you, your Honor.

2 You have very dedicated attorneys with a lot of
3 integrity and a 30-year history to establish that. You
4 have got subclass representatives who have made
5 communication very difficult in two respects. One is by
6 this whole -- you know, the notion that calls had to be
7 recorded. Recordings end up on the internet. So -- and
8 the combination of that -- and at this point it's very
9 hard for us to have any confidence that -- that -- that
10 one of two things won't happen: Either that statements
11 that are made in the course of confidential
12 communications will end up in the public domain,
13 including if we talk to them about the weaknesses of the
14 case or potential problems in the case -- I mean, that's
15 damaging to the class.

16 The other concern is them making public statements
17 or filing papers, saying things in public, without
18 running them by counsel that's been appointed by the
19 Court, so that we can evaluate what the potential
20 implications in the case are. Those things are damaging
21 to the class, and what I would say, your Honor, is I'm a
22 big boy. I have dealt with clients who are in shackles
23 when they are interacting with me, who were in shackles
24 for my safety. I mean, I will do that. I will work
25 with anyone.

1 What concerns me, your Honor, is conduct that I
2 think is detrimental to the subclass, and as an officer
3 of the court, I can't give you assurances or confidence
4 on my part that that conduct on their part is going to
5 stop because I have seen it year after year after year.

6 So if -- if the way your Honor wants to proceed, if
7 you are asking me can we work with them and try to plow
8 forward as effectively as we can, we can do that, and I
9 will do that. But if you are asking me to tell you that
10 based on everything I have seen I have confidence that
11 these problems are going to end, that I can't represent
12 to you. All I can represent is that as an officer of
13 the court and as a lawyer that has -- places great value
14 on my personal integrity and my commitment to the case,
15 I am certainly willing to do everything we can on our
16 part to make that work.

17 THE COURT: All right. So I am not going to
18 decide the motion today. My perception is the problem
19 is bilateral. It was not my perception that any of the
20 plaintiffs' counsel merited removal. I decided no
21 removal. The communication hasn't been the best. I
22 made it very clear to existing class representatives
23 that if you aren't pulling for the class and you are
24 tanking the lawsuit and you are undermining the
25 plaintiffs' position in the eyes of the defense, that's

1 a nonstarter too.

2 So my interest, as the fiduciary to the class, is
3 what's happening to this class. And that's my candid
4 observation. It has been bilateral. Right now you are
5 in a better position than the existing class
6 representatives, but I am wary of removing the
7 dissenting voice from the process. And so my message to
8 class representatives is get with the program. You
9 are -- your views will be respected. They will be taken
10 up in the event there is a settlement. We may talk
11 again if this case proceeds to trial because I don't
12 know how you can put on a witness who's not willing to
13 prep with you and not willing to adhere to your theory
14 of the case, but I am a little bit concerned at the
15 adversarial posture continuing.

16 I wasn't surprised that the defendants threw
17 gasoline on the fire with their motion to certify --
18 decertify the class, but I -- they're seeing the chaos,
19 and as good advocates, they are taking advantage of it.
20 And that's not in the best interests of the class.

21 MR. PIERSON: If I could just make two
22 comments on that. One is, you know, I do think it's
23 important the Court understand, I mean, I really try to
24 be kind of an umpire. I mean, I really have tried
25 to stay objective about this. I have talked to a lot of

1 people about the case, and -- experienced counsel, and
2 tried to get other perspectives, and one of the reasons
3 we filed the motion is, you know, we are officers of the
4 court, your Honor, and the issues we raised about the
5 subclass rep, they are serious issues, and, you know, it
6 would -- frankly, I think, it had gotten to a point
7 where it wouldn't have been consistent with our
8 responsibilities not to raise them.

9 Now, I understand what the Court's saying. You
10 know, we will march on on whatever basis we are told to,
11 but I think it was important to raise them to the Court
12 on this, and I think it's the right thing to do.

13 I think the Court makes a second important point,
14 which is there's a distinction between where we are now,
15 at which a difference in views and dissenting voices,
16 it's all part of the process and a healthy thing.
17 That's very different than how do you proceed to trial,
18 and I think implicit in what the Court's saying, which I
19 completely agree with, is let's take this one step at a
20 time. Let's everybody be grownups. Let's everybody
21 stay focused on the interest, is how do we protect the
22 subclass, and let's march forward one step at a time,
23 and we will do that responsibly, your Honor.

24 THE COURT: Okay. Let me hear from any other
25 plaintiffs' counsel that is not duplicative of Mr.

1 Pierson, and that may be Mr. Abrams from his class or
2 our new counsel about what they need, what -- a time
3 frame they need, any plans for going forward. So --

4 MR. ABRAMS: Thank you, your Honor.

5 I have nothing to add to what Mr. Pierson said. I
6 am happy to address any issues or questions of the
7 Court.

8 THE COURT: All right. That's fine.

9 How about our new counsel? Mr. Cassidy or
10 Mr. Smith?

11 MR. SMITH: Good morning. I'm Daniel Smith.
12 Again, thank you for your decision over the summer to
13 include Mr. Taylor and Mr. Aubertine to begin with, and
14 Mr. Cassidy and myself by way of follow-up.

15 I think your summary of what we had intended
16 captures much of what I had intended to say, so I can be
17 relatively brief.

18 I would add that Steve Taylor and I basically
19 sketched this out to begin with as a team approach to
20 this, and it's taken a while but we have gotten there to
21 put the four of us together into this team. I think the
22 motion practice really sharpened the role we were trying
23 to develop and it's been very helpful for that.

24 One consequence is I haven't yet had a chance to
25 speak with DFA's counsel. I am in sort of an unusual

1 position. I am quite familiar with Mr. Kuney's client
2 but I am not particularly familiar with him. So we
3 haven't yet got to the point of becoming familiar with
4 the defendants' counsel.

5 As far as our road map, I think, as I said, we laid
6 it out in our motion. What we'd like to do is become
7 more familiar with the case based on the additional
8 documents that are now available to us, and now that we
9 have the status of both additional representatives and
10 counsel, we would like to go back through and
11 communicate more formally with our fellow counsel as
12 well as the farmers.

13 I think your point to Mr. Pierson, the role of
14 dissenting voices in this type of dairy matter is very
15 important. So we want to communicate with the Haars and
16 the Sitts and Mr. Swantak, get a better feel for their
17 concerns, but at the same time we speak with other
18 farmers from around the community in terms of their
19 feelings as well; at the same time educate ourselves in
20 the documents, sit down with Mr. Abrams and his
21 counterparts, and see where we are.

22 The goal --

23 THE COURT: How much time do you think you are
24 going to need to do that?

25 MR. SMITH: I think there are really two

1 points: What is the time and what is the goal? We
2 figure something on the order of six weeks to two months
3 for that process. We have a benchmark, an immediate
4 benchmark in front of us to meet with Mr. Abrams down in
5 D.C. the end of next week, so I think we are all very
6 sanguine to the fact that this process has to move
7 forward and our role is not to slow it down but is to
8 move it forward.

9 So we want to get right to further discussions with
10 them next week, get through the record, talk with the
11 farmers. We figure a six-week process for that. The
12 goal is to develop some form of alternative proposed
13 settlement to sit down with the DFA side in that
14 six-weeks to two-month period. Our objective is -- and,
15 again, where you started is kind of where we are.

16 I think what is unreasonable is to think that
17 Capper-Volstead is going to be done away with in this
18 case. On the other hand, where the proposed settlement
19 is right now, from Mr. Aubertine and Mr. Taylor's
20 perspective, doesn't go far enough. So what we are
21 looking for is somewhere in that range, in the middle of
22 what is realistic but what really is more responsive to
23 the concerns that Mr. Taylor and Mr. Aubertine have
24 heard.

25 THE COURT: All right. And do you have a

1 position on any of the pending motions? And should I
2 wait for your response? Or -- I know you have just got
3 on board, so --

4 MR. SMIHT: I think we're basically new to
5 the -- new to the case. Our primary focus is on the
6 issue of whether we can find some additional,
7 substantive provisions for a proposed settlement, see if
8 we can find a resolution to the case short of going to
9 trial, and that's our primary focus. And I think the
10 issues that you are dealing with are teed up well by all
11 the other parties, and we are basically sitting those
12 out at this point.

13 THE COURT: Okay. Mr. Kuney?

14 MR. KUNEY: Morning, your Honor.

15 THE COURT: Good morning.

16 MR. KUNEY: Steve Kuney for the defendants DFA
17 and DMS. A couple of remarks.

18 We -- we believed and still believe that the
19 settlement that was submitted to the Court was a
20 reasonable resolution of this matter for all concerned.
21 We are --

22 THE COURT: Did you believe that the Court
23 could approve it without fairness hearing, class notice,
24 all that?

25 MR. KUNEY: I actually didn't understand that

1 the request was to not have a fairness hearing. What
2 I -- what I thought, the way I read the motion, was that
3 they were suggesting that we didn't -- was not necessary
4 to have a new notice because the revised agreement was
5 more favorable to the class, but I had always expected
6 there would be a fairness hearing and there would be an
7 opportunity for people to come in and talk. And then
8 your Honor would make the --

9 THE COURT: How would they know where to --
10 without notice, how do you file an objection? So that
11 kind of caught me by surprise, and since it was kind of
12 a joint proposal, I hadn't seen that. And when we
13 looked at cases in which that had happened, it was
14 instead of getting 4,000, you got 4,500, and you didn't
15 complain about 4-, so you are not going to complain
16 about 4,500, or something like that. I didn't see that
17 that's where we were.

18 So how would we -- I guess it's esoteric, but I
19 don't see that we would have a fairness hearing without
20 notice.

21 MR. KUNEY: Well, I may have come up with my
22 own vision of how the process was going to play out.
23 Frankly, that was part of the reason that we thought it
24 made sense that the proposal was made in the alternative
25 so that if you thought the fuller process was necessary,

1 we could move forward in that direction. I had not
2 anticipated -- obviously if we are going to have a
3 preliminary approval process, there would need to be
4 notice and all the steps would be required. I had
5 anticipated that if your Honor thought that was the
6 appropriate direction, you would have sort of told the
7 parties to do that. You didn't. You simply denied the
8 motion based on the -- not having in front of you
9 enough, which I totally understood that. But I did
10 think it wasn't that there wasn't going to be objection
11 to the new agreement; it was that the objectors had made
12 a very extensive record of their objections. It was --
13 we weren't anticipating, candidly, that a lot of those
14 objections would be affected. They would remain; they
15 would remain alive and well, and your Honor would be
16 once again put in a position to review the settlement.

17 The primary things that had changed from before
18 were -- and your not approving the original settlement,
19 you had expressed some concern about the process and
20 commented that you were unable to conclude that the
21 process weighed in favor of approving the settlement.

22 First --

23 THE COURT: So I actually made two comments.
24 Process, which we took care of with the motion for new
25 counsel --

1 MR. KUNEY: Right.

2 THE COURT: -- and substantive, and that was
3 the objections. But let's assume we are down the road.

4 MR. KUNEY: Right.

5 THE COURT: That's done.

6 MR. KUNEY: All right. Right.

7 THE COURT: Right? And it's an interesting
8 conversation because we haven't had it before.

9 MR. KUNEY: I understand.

10 THE COURT: Let's talk about the path going
11 forward.

12 MR. KUNEY: Okay. Understood and agree.
13 That's sort of spilt milk at this point, if you will
14 excuse the pun.

15 We appreciate that new people have been named. We
16 have seen the motion to add even more new people. We
17 are not unwilling -- we will listen. We will
18 participate in the negotiating process in good faith.
19 We don't -- candidly, we don't see the settlement as
20 needing massive change to be fair. New people who are
21 coming, who may have radically different perspectives
22 and may have ideas that we never heard about or thought
23 about, we're willing to entertain them, although, as we
24 have said before, we do tend to think that the
25 settlement ought to relate to the case, and so it would

1 be -- we are not sure what new ideas will fit to the
2 case, but we are open. We are open to the process, and
3 we do think it makes sense, and we think everybody ought
4 to try very hard to see if we can kind of put Humpty
5 Dumpty back together again before we proceed down the
6 other path.

7 So we are, I will say, willing and anticipating
8 full participation in taking the best shot we can at
9 seeing whether it's possible to get this -- get -- to
10 come back to the Court with another settlement that has
11 broader approval among the class reps and that we can go
12 through whatever the full process, present it to the
13 class, and send out notice, and you can again evaluate
14 the people who are not in front of you and how they feel
15 about it.

16 So we are fine with that. We will do it. We
17 remain committed to it. We wanted to settle the case
18 before. We'd still like to see if we can work that out.

19 In terms of the pending motions -- I will be very
20 quick on that -- we don't take a position on the renewed
21 motion to replace class counsel. We don't have a
22 position on the proposal to add new class reps on the
23 DFA, DMS side, or on the substitution. We don't have a
24 position on either of those.

25 The motion to decertify, we said in the motion that

1 if we were in a settlement world, that would be a
2 different course, but we were looking ahead to the -- to
3 the prospect of another world. And some of the comments
4 your Honor has made this morning about the unworkability
5 of the class reps' purposes of trial is precisely part
6 of what we were thinking about, but we were also
7 thinking about what you had said when the two subclasses
8 were first created, which is that you saw at least the
9 potential for a conflict between those who support and
10 benefit from DFA, DMS policies and those who do not.
11 And that when the two -- two subclasses were created,
12 what I at least had envisioned that would likely mean is
13 that the non-DFA class -- we wouldn't expect them to
14 necessarily be fans or supportive of DFA policies, but
15 that it -- but those farmers who are supportive of what
16 are ultimately determined to be the lawful policies of
17 DFA and DMS would have a voice on the DFA -- DFA, DMS
18 subclass sides.

19 What prompts the motion is that that seems to not
20 be happening right now. That with the class
21 representatives for the DFA, DMS side, none of them --
22 not only didn't voice any support or -- or express the
23 view that the organizations were favorable, but they
24 literally sought the dissolution of them as dairy
25 marketing organizations, and we found it hard to see how

1 the many, many DFA farmers -- and we're not going to
2 debate with you this morning how many, but a lot of them
3 have come to court in various forms, through affidavit,
4 through support of the process. I think it's -- I think
5 it's beyond question that there's some significant
6 number of people on the DFA, DMS side who want the
7 lawful activities of those organizations to continue and
8 find them very helpful and very beneficial to their
9 lives. They seem to us right now to have no voice.

10 Whether the new proposed class reps provide that
11 voice, I will be honest with you, I can't tell at this
12 moment based on the limited record that we have so far,
13 and I have already discussed with Mr. Pierson whether he
14 would be willing to let us defer our reply brief on that
15 motion until we can get a better sense of whether we
16 think the problem that we raised has been solved or not,
17 but we are not -- we are not yet prepared this morning
18 to say we are withdrawing the motion to decertify
19 because it's all fine. Because, from our perspective,
20 it's at best unclear whether the problem we raised has
21 been fixed, and surely if we are in litigation mode, the
22 problem's not been fixed.

23 THE COURT: Was the class decertified in the
24 Southeastern milk case before trial?

25 MR. KUNEY: The class was decertified -- yes,

1 there was a time when the DFA, DMS class was
2 decertified. Then what happened is Dean raised the
3 issue of whether their settlement could still be valid
4 since they had now settled with the class that the court
5 had ruled could not be certified. Then we went through
6 the process of creating subclasses, and then the DFA,
7 DMS class sought recertification for purposes of
8 continuing the litigation.

9 THE COURT: Okay.

10 MR. KUNEY: So we went through -- we went
11 through quite a -- maybe I should say similarly
12 protracted process of -- but there was a period of time
13 when the DFA, DMS class was out.

14 THE COURT: Okay.

15 MR. KUNEY: And so that's -- so we are not --
16 we are not necessarily seeking an early ruling on that,
17 but we are not in a position to withdraw it because we
18 think the problem is -- still is very real, that there
19 ought to be someone representing those I think
20 thousands, hundreds, dozens, whatever the number is, of
21 members of the DFA, DMS class who affirmatively think
22 these organizations are terribly important, positive
23 forces in their lives, and critical, and that voice
24 ought to be heard as part of this settlement process and
25 certainly any litigation process as well, and we don't

1 yet see that on the DFA side, but we are -- as part of
2 this process of moving forward, we are going to take a
3 hard look at that too.

4 We are not interested in -- we are not interested
5 in forcing decisions on issues that don't need to be
6 decided, but I do want the Court to understand that the
7 concern that prompted the decertification motion is
8 still this morning very much alive and well in our minds
9 because we don't yet see that kind of voice that we
10 think those dairy farmers deserve to have.

11 THE COURT: Okay.

12 MR. KUNEY: Okay?

13 THE COURT: All right.

14 MR. KUNEY: Thank you.

15 THE COURT: Here's going to be our plan going
16 forward. When we started the case, I told you it would
17 not -- I would not let it become the most expensive and
18 protracted case on the court's docket -- and of course
19 it has become one -- and that I would be involved
20 heavily until you could get along and manage the
21 discovery schedule yourselves.

22 And from that point forward, you did a very nice
23 job of moving the case forward. There were no discovery
24 disputes that were not meaningful ones that required
25 judicial intervention. They were very limited in

1 nature. Lots of discovery was underway. The summary
2 judgment process, although I think you must think I am
3 beyond human with the amount of stuff you gave me to
4 read, proceeded smoothly enough. So you are capable of
5 moving the case forward in an efficient and reasonable
6 manner.

7 You have 90 days to see if you can settle the case,
8 and I don't care whether you settle it or not. It's --
9 then we are going to go to trial because I do have an
10 obligation to get this case resolved. It's my oldest
11 case, and it needs to be resolved. So you will go to
12 trial, and we will have different issues at trial.

13 So one thing that the class representatives need to
14 understand is that dissenting voices in the settlement
15 process can be helpful and productive, but if you are
16 not pulling with the same oar at trial in front of a
17 jury, and you have open contempt for the attorney that's
18 doing your direct examination, that is not a good thing.
19 That's not in the best interests of the class.

20 And so dissension is not to be avoided. That's
21 what makes full representation of the class important,
22 and Mr. Kuney has a good point: If the class
23 representatives are doing their job, we are hearing from
24 people who love Mr. Kuney's clients. And he is right,
25 there must be some members of the class who feel that

1 way, and they need to be heard as well.

2 So you are collecting all the information from the
3 class. You are making the best decision for the class
4 at whole. You have to give up some of your own
5 hard-felt goals about the perfect settlement that will
6 achieve happiness in the dairy industry for everyone
7 from that point forward. That is not a settlement, and
8 it probably isn't going to be produced at trial, but
9 that's our other way of resolving disputes.

10 So 90 days I am going to ask for a joint report. I
11 will rule on all motions except for the motion to
12 decertify a class. I am going to at least wait 90 days
13 because I don't see that's something that I need to do
14 now, but it's something to take up at trial. It puts
15 significant risk on the plaintiffs going forward, so you
16 should factor that in to your negotiations as well.

17 I think in settlement it's very important to assume
18 that things are on the table until they come off. Some
19 things are unrealistic, but I thought that there was a
20 substantive problem with the prior settlement in that
21 the injunctive relief is what people felt was
22 inadequate, and I made my opinion known that \$50
23 million, while it was not unreasonable on its face, that
24 doesn't mean that it shouldn't be more, it shouldn't be
25 less. That's, again, none of my business, and I don't

1 care, but it was the injunctive relief that caught my
2 attention because that was what the class told the
3 Court: We want to go to trial. We want to change the
4 way things are done. This is how we want to alter
5 what's happening in the dairy industry.

6 So I will leave you to 90 days. You will be
7 hearing from me if I don't hear from you, and you should
8 anticipate that when that 90 days is up, we are going to
9 be on a fast track to trial. I have decided you can
10 just refile all your motions in *limine*. I have decided
11 the summary judgment motions. I know what the issues
12 are going to be. We will be here in Burlington now, and
13 we aren't sharing courtrooms as of two weeks ago. So
14 you will have plenty of time to try the case.

15 Anything further in this matter?

16 MR. PIERSON: No, your Honor. Thank you.

17 THE COURT: Mr. Haar, did you want to say
18 something?

19 JONATHAN HAAR: Yeah. Can --

20 THE COURT: You can say something briefly.

21 JONATHAN HAAR: Yes.

22 THE COURT: Sure. Come on up.

23 JONATHAN HAAR: I am just looking for
24 clarification on one issue.

25 THE COURT: Sure.

1 JONATHAN HAAR: With regards to communication
2 back and forth, we ran into a real glitch over the last
3 10 days or -- a week ago plus 10 days, and I was just
4 looking for clarification as to your ruling.

5 You said e-mails and recordings wouldn't work, and
6 we agreed with that, that, you know, you want to be able
7 to at least occasionally speak together, and I
8 appreciate your, number one, recognizing dissenting
9 voices equal justice and, number two, my blood type,
10 my wife likes to share with people, is B positive. So,
11 you know, I am always willing to try to go forward and
12 hope for the best.

13 THE COURT: So let me take this opportunity,
14 it is very important for the class as a whole, that I --
15 my job, according to the law, is to be the fiduciary to
16 the class as a whole. I need you to represent that
17 class as a whole or you can't be a class representative.

18 JONATHAN HAAR: I understand that -- that
19 completely.

20 THE COURT: Okay.

21 JONATHAN HAAR: And I believe I can speak for
22 the others that we all understand that completely. You
23 understand we had some significant concern.

24 THE COURT: Understood. Okay, so you want
25 some guidance going forward, and go ahead and ask me a

1 question.

2 JONATHAN HAAR: Well, what had happened was we
3 were looking to make recorded conference calls. We felt
4 we'd have an electronic secretary at that juncture, and
5 that's where the impasse was.

6 So --

7 THE COURT: So I think that's a bad idea
8 because it suggests you are making a record that is then
9 going to be used against your counsel in some later
10 proceeding. It's not necessary. If -- if you wanted to
11 get up and testify, if we came to that, you could
12 testify. And it introduces an element into a free
13 discussion that's not appropriate.

14 So one of the things that I have tried to caution
15 everybody north of the V is, I don't want to know about
16 your attorney/client relationships, and I certainly
17 don't want these people privy to strategy and "I don't
18 like this" and "then we had this conversation and this
19 is what happened." It's not good for the class.

20 So I think recording it is a bad idea. It
21 introduces an element that people have to wonder where
22 those recordings are going to go for and how they are to
23 be used. You should be having a candid conversation
24 that's respectful. They shouldn't schedule the
25 conference calls at short time. That did catch my

1 attention. And let's see if you guys can work together
2 because there are solutions when people cannot work
3 together. It happens all the time in cases. And that
4 that's somebody has to go and you want it to be the
5 counsel and they want it to be you. And let's see if we
6 can make sure that you are both still in the case
7 because you have information of value to share. Okay?

8 So I don't want to --

9 JONATHAN HAAR: Yes. I appreciate that very
10 much.

11 THE COURT: Okay.

12 JONATHAN HAAR: And I hope that you got our
13 attempt to clarify our, quote, nonnegotiables. We were
14 negotiating with our counsel. We were looking for the
15 sun, the moon and the stars, we recognized fully, and we
16 shared that very quickly with them the following e-mail,
17 that we were looking for -- you know, we want goals.
18 How we get there, obviously their choice.

19 THE COURT: Well, we will have new people in
20 the mix, and that's always -- it's like a chemistry
21 experiment. I am hoping it's a good chemistry
22 experiment, and we'll see what happens.

23 I will wait to hear from you all in 90 days. All
24 right?

25 Thank you.

1 JONATHAN HAAR: And I will be looking forward
2 to speaking with all of them.

3 (Court was in recess at 10:47 a.m.)

4 *** ** ***

5
6
7
8 C E R T I F I C A T I O N

9 I certify that the foregoing is a correct
10 transcript from the record of proceedings in the
above-entitled matter.



11
12 October 9, 2015
Date

Anne Nichols Pierce